IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1548 OF 2005
IN
SUMMONS FOR JUDGMENT NO.685 OF 2000
IN
SUMMARY SUIT NO. 1878 OF 2000

Shri Sanjay Fatehpuria ... PLAINTIFF

V/s.

Jitesh J. Shah, Prop.
M/s. Vardhaman Investments ... DEFENDANTS
& Anr.

Ms. Jayashree Agarwal i/b. M.L. Bansal for the plaintiff.
Mr. A.S. Malwankar for the defendants.

CORAM : ANOOP V. MOHTA, J.
DATED : 24th March, 2006

P.C.

. Heard.

2. The Summary Suit has been decreed against the defendants exparte as leave to defend was denied. The summons for judgment was disposed of accordingly by orders dated 1st July, 2002. Therefore, present Notice of Motion has been taken out by defendant No. 2, who is proprietor of defendant No.1. Admittedly, defendant No. 1 appeared in person and filed his note of appearence at the relevant time. The applicant was unaware of the legal proceedings and procedure, waited for the next date or intimation. No notice of any

kind was received from the plaintiff. Admittedly, therefore, no affidavit for leave to defend was filed. Being layman and innocent about the procedure waited for the Court's notice. After two years, when enquired from the office, he came to know about the impugned ex-parte orders. Therefore, this Notice of Motion to set aside the exparte order and also praying leave to defend by invoking provisions of Order XXXVII Rule 4 of C.P.C.

3. Notice of Motion No. 568 of 2004 was dismissed on 10th February, 2005. The Division Bench on 2nd May, 2005 in appeal against the said order set aside the order of dismissal by a consent of the parties. The Notice of Motion was therefore restored to file. However, the learned Counsel appearing for the applicant in support of the Notice of Motion made a statement that they would take out fresh Notice of Motion for appropriate relief within four weeks. Based upon the same the present Notice of Motion has been taken out whereby, defendant No. 2 seeks to set aside the ex-party order in summary Suit No. 1878 of 2000 dated 1st July 2003. In the above background and in view of the averments a sufficient cause has been shown to consider the prayers, as admittedly,

applicant appeared-in-person at the relevant time.

4. The averments made in affidavit in support of the Notice of Motion also justify the case of the applicant for setting aside the ex-parte order and the decree. From the averments made in affidavit in support of Notice of Motion and in affidavit in reply to the said Notice of Motion, it appears that there are claims and counter claims raised, which need deleberation. However, without going into any further controversy, in the interest of justice as applicant appeared in person at the relevant time I am inclined to grant prayer clause (a), (b) & (c). It is further made clear that the Summons for the Judgment and the suit are to be disposed of and be decided by giving opportunity to both the parties. The ex-parte order is therefore set aside. Summons for Judgment restored to file.

5. In view of this, Notice of Motion is allowed in terms of prayer clause (a), (b) & (c), however, this will be subject to cost of Rs. 2000/- to be paid within two weeks as a condition precedent.

Prayer clause -

(a) That the exparte decree order passed in

summary Suit No. 1878 of 2000 on 1st July, 2002 by his lordship Mr. F.I. Rebello be set aside.

(b) That the order in Summons for Judgment No. 685 of 2000 denying leave to defend passed on 1st July, 2002 by his lordship Mr. F.I. Rebello be set aside.

(c) Delay, if any, in taking out this motion be condoned.

6. This Notice of Motion disposed of accordingly.

[ANOOP V. MOHTA, J.]